

## AMS/FAST CHANGE REQUEST (CR) COVERSHEET

**Change Request Number:** 19-53

**Date Received:** September 16, 2019

**Title:** Organizational Conflict of Interest

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**Policy and Guidance:** (check all that apply)

- ☐ Policy
- ☒ Procurement Guidance
- ☐ Real Estate Guidance
- ☐ Other Guidance
- ☐ Non-AMS Changes

**Summary of Change:**

The change request clarifies what contract actions (contracts, grants, cooperative agreements, or other transaction agreements) are applicable in identifying potential OCIs and provides guidance to the COs in assessing OCIs.

**Reason for Change:**

The change is in response to two OIG Recommendations (OIG Report No. ZA2012082 #9 and ZA2017098 #3)

**Development, Review, and Concurrence:** Procurement Policy, AAP-110, AAQ Managers, and AGC.

**Target Audience:** Contracting personnel, program offices, acquisition workforce

**Briefing Planned:** No.

**ASAG Responsibilities:** Electronic approval on 09/25/19.

**Section / Text Location:** T3.1.7

**The redline version must be a comparison with the current published FAST version.**

- ☒ I confirm I used the latest published version to create this change / redline  
**or**  
☐ This is new content

**Links:** <https://fast.faa.gov/docs/procurementGuidance/guidanceT3.1.7.pdf>

**Attachments:** Redline and final documents.

**Other Files:** N/A

Redline(s):

Section Revised:

**2 Identification of Potential OCI Situations**

Procurement Guidance - (~~7~~10/2019)

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T3.1.7 Organizational Conflict of Interest Revised 4/2006

A Organizational Conflict of Interest

1 Responsibilities Related to Organizational Conflict of Interest

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### T3.1.7 Organizational Conflict of Interest Revised 4/2006

#### A Organizational Conflict of Interest

##### 1 Responsibilities Related to Organizational Conflict of Interest

a. The policy of the FAA is to avoid contracting with contractors who have unacceptable organizational conflicts of interest. An organizational conflict of interest means that because of existing or planned activities, (1) an offeror or contractor is unable or potentially unable to render impartial assistance to the agency, or (2) has an unfair competitive advantage, or (3) the offeror or contractor's objectivity is or might be impaired. It is not the intention of the FAA to foreclose a vendor from a competitive acquisition due to a perceived OCI. FAA Contracting Officers are fully empowered to evaluate each potential OCI scenario based upon the applicable facts and circumstances. The final determination of such action may be negotiated between the impaired vendor and the Contracting Officer. The Contracting Officer's business judgment and sound discretion in identifying, negotiating, and eliminating OCI scenarios should not adversely affect the FAA's policy for competition. The FAA is committed to working with potential vendors to eliminate or mitigate actual and perceived OCI situations, without detriment to the integrity of the competitive process, the mission of the FAA, or the legitimate business interests of the vendor community. Contractors should be instructed to contact the FAA at the earliest possible time after an investment decision has been made for a particular acquisition to evaluate whether any identified actual or potential conflicts of interest may be avoided or mitigated. As used herein, the term "person" includes any legal entity including a partnership, corporation, or association.

b. Mitigation Plans. The FAA reserves the right to audit any or all proposed mitigation plans, and to reject a plan, if in the opinion of the Contracting Officer such a plan is not in the best interests of the FAA.

##### 2 Identification of Potential OCI Situations Revised 4/200610/2019

a. Contracting Officers should analyze planned acquisitions in order to:

(1) Identify and evaluate potential OCI's as early as possible in the acquisition process ~~{and where possible prior to issuance of an initial screening information request (SIR), if possible};~~ and

(2) Avoid, neutralize, or mitigate potential conflicts before award of any contract-award, grant, cooperative agreement, or other transaction agreement.

b. *Examples of Conflict Situations.* The following examples illustrate situations in which questions concerning organizational conflicts of interest may arise. They are not all inclusive, but are intended to help the Contracting Officer apply general guidance to individual contract situations:

(1) *Unequal Access to Information.* Access to "nonpublic information" as part of the performance of an FAA contract, grant, cooperative agreement, or other transaction agreement that could provide the contractor a competitive advantage in a later

competition for another FAA contract. Such an advantage could easily be perceived as unfair by a competing vendor who is not given similar access to the relevant information. If the requirements of the FAA procurement anticipate the successful vendor may have access to nonpublic information, all vendors should be required to submit and negotiate an acceptable mitigation plan.

(2) *Biased Ground Rules.* A contractor in the course of performance of an FAA contract, grant, cooperative agreement, or other transaction agreement, has in some fashion established important "ground rules" for another FAA ~~contract~~acquisition, where the same contractor may be a competitor. For example, a contractor may have drafted the statement of work, specifications, or evaluation criteria of a future FAA procurement. The primary concern of the FAA in this case is that a contractor so situated could slant key aspects of a procurement in its own favor, to the unfair disadvantage of competing vendors. If the requirements of the FAA procurement anticipate that a contractor may have been in a position to establish important ground rules, including but not limited to those described herein, the contractor should be required to submit and negotiate an acceptable mitigation plan.

(3) *Impaired Objectivity.* A contractor in the course of performance of ~~an~~ FAA contract, grant, cooperative agreement, or other transaction agreement, is placed in a situation of providing assessment and evaluation findings over itself, or another business division or a subsidiary of the same corporation, or another entity with which it has a significant financial relationship. The concern in this case is that the contractor's ability to render impartial advice to the FAA could appear to be undermined by the contractor's financial or other business relationship to the entity whose work product is being assessed or evaluated. In these situations, where a "walling off" of lines of communication may well be insufficient to remove the perception that the objectivity of the contractor has been tainted. If the requirements of the FAA procurement indicate that the successful vendor may be in a position to provide evaluations and assessments of itself or corporate siblings, or other entity with which it has a significant financial relationship, the affected contractor should provide a mitigation plan that includes recusal by the vendor from the affected contract work. Such recusal might include divestiture of the work to a third party vendor.

c. Contracting Officers should obtain the advice of legal counsel and appropriate technical specialists in evaluating potential conflicts and in developing any necessary SIR provisions and contract clauses. Each individual contracting situation should be examined on the basis of its particular facts and the nature of the planned contract. The exercise of sound business judgement and discretion is required in both the decision on whether a significant potential conflict exists and the development of an appropriate mitigation plan. Before issuing a SIR for a contract that may involve a potential conflict, the Contracting Officer should formulate, in conjunction with legal counsel and team members, a course of action for resolving the conflict. The rational basis supporting the Contracting Officer's decision on an OCI issue should be documented in the contract file.

### **3 Disclosure by Offerors or Contractors Participating in FAA Acquisitions**

- a. Offerors or contractors should provide information which concisely describes all relevant facts concerning any past, present or currently planned interest, (financial, contractual, organizational, or otherwise) relating to the work to be performed and bearing on whether the offeror or contractor has a possible OCI.
- b. If the offeror or contractor does not disclose any relevant facts concerning an OCI, the offeror or contractor, by submitting an offer or signing the contract, warrants that to its best knowledge and belief no such facts exist relevant to a possible OCI.

#### **4 Remedies for Nondisclosure**

The following are possible remedies should an offeror or contractor refuse to disclose, or misrepresent, any information regarding a potential OCI:

- a. Refusal to provide adequate information may result in disqualification for award.
- b. Nondisclosure or misrepresentation of any relevant interest may also result in the disqualification of the offeror for award.
- c. Termination of the contract, if the nondisclosure or misrepresentation is discovered after award.
- d. Disqualification from subsequent FAA contracts.
- e. Other remedial action as may be permitted or provided by law or in the resulting contract.

#### **5 Contractor Participation in Preparing Specifications or Statements of Work**

The Contracting Officer should consider the following when contractor support is used to prepare specifications or statements of work:

- a. If a contractor prepares and furnishes complete specifications covering nondevelopmental items, to be used in a competitive acquisition, that contractor may have a conflict in furnishing these items, either as a prime contractor or as a subcontractor, for a reasonable period of time including, at least, the duration of the initial production contract. Therefore, a contractor who has prepared and furnished completed specifications for such items should be excluded from competition for that acquisition. However, an OCI may not exist in the following circumstances:

- (1) Contractors furnish, at Government request, specifications or data regarding a product they provide, even though the specifications or data may have been paid for separately or in the price of the product; or

(2) Situations in which contractors, acting as industry representatives, help Government agencies prepare, refine, or coordinate specifications, regardless of source, provided this assistance is supervised and controlled by Government representatives.

b. If a single contractor drafts complete specifications for nondevelopmental equipment, it should be eliminated for a reasonable time from competition for production based on the specifications. This should be done in order to avoid a situation in which the contractor could draft specifications favoring its own products or capabilities. In this way the FAA may be assured of getting unbiased advice as to the content of the specifications and may avoid allegations of favoritism in the award of production contracts.

c. There may be instances when contractor assistance is necessary in preparing statements of work. When contractor support is used, the contractor might be in a position to favor its own products or capabilities. If a contractor prepares, or assists in preparing, a statement of work to be used in competitively acquiring a system or services, or provides material leading directly and without delay to such a statement of work, that contractor may not supply the system, major components of the system, or the services unless:

(1) It is the single source; or

(2) It has participated in the development and design work; or

(3) More than one contractor has been involved in preparing the work statement.

d. In development work, it is normal to select firms that have done the most advanced work in the field. These firms can be expected to design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than firms that did not participate in the development, and this can affect the time and quality of production, both of which are important to the Government. In many instances the Government may have financed the development. Thus, while the development contractor has a competitive advantage, it is an unavoidable one that is not considered unfair, therefore no OCI mitigation would be necessary.

## **6 Procedures**

a. The Contracting Officer should award the contract to the apparent successful offeror unless a conflict of interest is determined to exist which cannot be neutralized, avoided, or mitigated. Before determining to withhold award based on conflict of interest considerations, the Contracting Officer should notify the contractor, provide the applicable reasons, and allow the contractor a reasonable opportunity to respond. If after consultation with legal counsel and team members, the Contracting Officer determines that it is in the best interest of the FAA to award the contract notwithstanding a conflict of interest, the Contracting Officer should document that determination.

b. When investigating a suspected OCI concerning a prospective contractor (in instances when a contractor has not independently submitted any information), the Contracting Officers should first

seek the information from within the Government or from other readily available sources. Government sources include the files and the knowledge of personnel within the contracting office, other contracting offices, the cognizant contract administration and audit activities and offices concerned with contract financing. Non-Government sources include publications and commercial services, such as credit rating services, trade and financial journals, and business directories and registers.

c. If the Contracting Officer decides that a particular acquisition involves a potential OCI, the Contracting Officer should, before issuing the SIR:

- (1) Prepare a written analysis, including a recommended course of action for avoiding, neutralizing, or mitigating the conflict; and
- (2) If appropriate, a draft SIR provision and/or contract clause.

d. The Contracting Officer should also consider additional information provided by prospective contractors in response to the SIR or during negotiations and attempt to avoid, neutralize, or mitigate the OCI before contract award.

e. The Contracting Officer should retain all organizational conflict of interest information in the contract file.

f. If, during the effective period of any restriction, a contracting office transfers acquisition responsibility for the item or system involved, it shall notify the successor contracting office of the restriction, and send a copy of the contract under which the restriction was imposed.

## **7 SIR Provisions**

The following should be considered in developing SIRs where potential conflicts of interest may be evident. As a general rule, potential organizational conflicts of interest may be resolved by imposing some restraint, appropriate to the nature of the conflict, upon the contractor's eligibility for future contracts or subcontracts. Therefore, affected SIRs should contain a provision that:

- a. Invites offerors' attention to this concern;
- b. States the name of the potential conflict as seen by the Contracting Officer;
- c. States the nature of the proposed restraint upon future contractor activities; and
- d. Depending on the nature of the acquisition, states whether or not the terms of any proposed clause and the application of this information to the contract are subject to negotiation.

## **B Clauses**



[view contract clauses](#)

## **C Forms**

[view procurement forms](#)